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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Donimic T. Brooks,

No. CV 13-485-PHC-RCB (BSB)

10 Plaintiff,

11 vs.

ORDER

12 State of Hawaii, et al.,

13 Defendants.
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15 **I. Procedural History**

16 On January 10, 2013, Plaintiff Donimic T. Brooks, a State of Hawaii inmate who
17 is confined in the Corrections Corporation of America's Saguaro Correctional Center,
18 filed a document entitled "HRPP Rule 40(c)(2)(3) Form and content, (2) Nonconforming
19 Petition, (3) Separate Cause of Action" ("Complaint") and a Motion for Summary
20 Judgment in the Circuit Court of the First Circuit of the State of Hawaii. On January 18,
21 2013, the Hawaii Circuit Court ordered all documents in the case to be reassigned as a
22 civil proceeding and served on Defendant State of Hawaii Department of Public Safety.
23 On March 4, 2013, Defendant State of Hawaii filed a Notice of Removal, removing the
24 case to the United States District Court for the District of Hawaii.

25 In a March 7, 2013 Order, United States District Court Judge Leslie E. Kobayashi
26 concluded that removal was appropriate because Plaintiff was alleging that Defendants
27 had violated the United States Constitution and laws. Judge Kobayashi transferred the
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1 case to the United States District Court for the District of Arizona pursuant to 28 U.S.C.
2 § 1404(a). The case was assigned to the undersigned.

3 On March 20, 2013, Plaintiff filed a Motion for Default Judgment. Defendant
4 State of Hawaii filed a Response and Plaintiff filed a Reply. On April 18, 2013, Plaintiff
5 filed a “Motion to Show Cause for Preliminary Injunction and or a Temporary
6 Restraining Order.” Defendant State of Hawaii filed a Response and Plaintiff filed a
7 Reply.

8 In a May 13, 2013 Order, the Court dismissed the Complaint because it was not
9 filed on a court-approved form and denied the Motion for Summary Judgment, Motion
10 for Default Judgment, and Motion to Show Cause. The Court gave Plaintiff 30 days to
11 file an amended complaint on a court-approved form.

12 On May 24, 2013, Plaintiff filed a First Amended Complaint (Doc. 15). On June
13 13, 2013, he filed a Motion for Summary Judgment (Doc. 16) and a Memorandum of
14 Law.

15 **II. Statutory Screening of Prisoner Complaints**

16 The Court is required to screen complaints brought by prisoners seeking relief
17 against a governmental entity or an officer or an employee of a governmental entity. 28
18 U.S.C. § 1915A(a). The Court must dismiss a complaint or portion thereof if a plaintiff
19 has raised claims that are legally frivolous or malicious, that fail to state a claim upon
20 which relief may be granted, or that seek monetary relief from a defendant who is
21 immune from such relief. 28 U.S.C. § 1915A(b)(1), (2).

22 A pleading must contain a “short and plain statement of the claim *showing* that the
23 pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2) (emphasis added). While Rule 8
24 does not demand detailed factual allegations, “it demands more than an unadorned, the-
25 defendant-unlawfully-harmed-me accusation.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678
26 (2009). “Threadbare recitals of the elements of a cause of action, supported by mere
27 conclusory statements, do not suffice.” *Id.*

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1 “[A] complaint must contain sufficient factual matter, accepted as true, to ‘state a
 2 claim to relief that is plausible on its face.’” *Id.* (quoting *Bell Atlantic Corp. v. Twombly*,
 3 550 U.S. 544, 570 (2007)). A claim is plausible “when the plaintiff pleads factual
 4 content that allows the court to draw the reasonable inference that the defendant is liable
 5 for the misconduct alleged.” *Id.* “Determining whether a complaint states a plausible
 6 claim for relief [is] . . . a context-specific task that requires the reviewing court to draw
 7 on its judicial experience and common sense.” *Id.* at 679. Thus, although a plaintiff’s
 8 specific factual allegations may be consistent with a constitutional claim, a court must
 9 assess whether there are other “more likely explanations” for a defendant’s conduct. *Id.*
 10 at 681.

11 But as the United States Court of Appeals for the Ninth Circuit has instructed,
 12 courts must “continue to construe *pro se* filings liberally.” *Hebbe v. Pliler*, 627 F.3d 338,
 13 342 (9th Cir. 2010). A “complaint [filed by a *pro se* prisoner] ‘must be held to less
 14 stringent standards than formal pleadings drafted by lawyers.’” *Id.* (quoting *Erickson v.*
 15 *Pardus*, 551 U.S. 89, 94 (2007) (*per curiam*)).

16 **III. First Amended Complaint**

17 In his First Amended Complaint, Plaintiff names as Defendants Warden Todd
 18 Thomas, Assistant Warden Benjamin Griego, Administrator/Contract Monitor Shari
 19 Kimoto, and Segregation Unit Contract Monitor Scott Jinbo.

20 In **Count One**, Plaintiff alleges violations of his First Amendment rights to free
 21 speech and the free exercise of religion. He claims that he studies both the Christian and
 22 Muslim religions and voluntarily participated in the “life principle/faith pod program,”
 23 which he knew at the outset was Christian-based but accepted inmates of all faiths.
 24 Plaintiff contends that he asked the program leader why the prison only offered a
 25 Christian-based program, but did not offer programs based on other faiths. Plaintiff
 26 states that the program leader did not know, but said that he would ask “the higher ups.”
 27 Plaintiff asserts that Defendant Griego told him that the curriculum came from the
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1 Corrections Corporation of America, the program was voluntary, and Plaintiff could
2 leave the program if he did not like it. Plaintiff did not leave the program.

3 Plaintiff contends that the following day, Defendant Thomas told Plaintiff that he
4 had better stop asking questions or he would be kicked out of the program or thrown into
5 segregation. Plaintiff alleges that he perceived this to be a personal threat to prevent
6 Plaintiff from exercising his First Amendment rights, documented the incident, and then
7 filed an inmate request, again inquiring as to why there were no faith-based programs for
8 a myriad of other religions.

9 Plaintiff asserts that his unit manager responded to the inmate request, but the
10 response was actually delivered by Defendant Griego, who handed Plaintiff the response
11 and told Plaintiff that he was being kicked out of the faith pod and that Plaintiff was
12 lucky he was not being placed into segregation. Plaintiff perceived this to be a personal
13 threat and documented it. He then submitted an informal resolution form, claiming that
14 his right to practice and study Islam was being hindered in the faith pod, that Defendant
15 Griego had kicked him out of the pod, and that Defendants Griego and Thomas had
16 threatened him. Unhappy with the grievance officer's response, Plaintiff proceeded to
17 the next step of the grievance process by filing a grievance.

18 Plaintiff states that while waiting for the response to his grievance, he met with
19 Defendant Griego for an "interview." At that time, Defendant Griego placed Plaintiff
20 into segregation and charged him with hindering and "failure to follow" for attempting to
21 provide false information and hindering the staff by lying. Plaintiff asserts that the
22 charges stem from the contents of his grievance.

23 Plaintiff claims he was found guilty of the charges and, as a result, lost pay for six
24 months and was placed in segregation for 60 days. Plaintiff appealed and the hearing
25 officer upheld the findings and penalty. Plaintiff submitted to Defendant Thomas an
26 appeal and a request that explained some the inconsistencies he believed were in the
27 reports. Plaintiff claims that Defendant Thomas denied the request, stating that he had
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1 spoken to Plaintiff and that Plaintiff had lied to him, and denied Plaintiff's appeal.
 2 Plaintiff submitted a "second request," which Defendant Thomas also denied.

3 Plaintiff claims he next wrote a letter to Defendant Kimoto about the situation, but
 4 Defendant Kimoto did not respond. Plaintiff asserts he subsequently requested that
 5 Defendant Kimoto answer his letter, but she has not responded to that request.

6 Plaintiff asserts that Defendant Griego violated Plaintiff's rights to free speech and
 7 his right to "participate and or practice – exercise – a religious program."

8 In **Count Two**, Plaintiff alleges a violation of his Fifth and Fourteenth
 9 Amendment rights regarding disciplinary proceedings. Plaintiff contends that Defendant
 10 Griego violated the grievance policy by placing Plaintiff in punitive segregation for 60
 11 days for submitting a grievance. Plaintiff claims that this was an "atypical environment."
 12 Plaintiff asserts that Defendant Thomas violated his rights by failing to grant Plaintiff's
 13 disciplinary appeal and that Defendants Kimoto and Jinbo are liable because of their
 14 "inaction." In addition, Plaintiff contends that Defendants violated his "right to grievance
 15 the government for redress" and violated the prison's disciplinary procedures.

16 In **Count Three**, Plaintiff alleges that Defendants Griego and Thomas retaliated
 17 against him, in violation of his Eighth Amendment rights, "[d]ue to the actions stated in
 18 [Counts] (1) and (2)." Plaintiff appears to be asserting that Defendants Griego and
 19 Thomas retaliated against him for filing a grievance claiming they had threatened him.

20 In his Request for Relief, Plaintiff seeks monetary damages and injunctive relief.

21 **IV. Discussion of the First Amended Complaint**

22 Although *pro se* pleadings are liberally construed, *Haines v. Kerner*, 404 U.S. 519,
 23 520-21 (1972), conclusory and vague allegations will not support a cause of action. *Ivey*
 24 *v. Bd. of Regents of the Univ. of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982). Further, a
 25 liberal interpretation of a civil rights complaint may not supply essential elements of the
 26 claim that were not initially pled. *Id.*

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1 **A. Count One**

2 It appears Plaintiff is alleging in Count One that he was denied his First
3 Amendment right to free exercise and was retaliated against for the content of his
4 grievance.

5 **1. Free Exercise**

6 To state a First Amendment, free-exercise-of-religion claim, a plaintiff must allege
7 that a defendant substantially burdened the practice of the plaintiff's religion by
8 preventing him from engaging in a sincerely held religious belief and that the defendant
9 did so without any justification reasonably related to legitimate penological interests.
10 *Shakur v. Schriro*, 514 F.3d 878, 884-85 (9th Cir. 2008).

11 Plaintiff does not allege that the practice of his religion was burdened or that he
12 was prevented from engaging in a sincerely held religious belief. Nor do his allegations
13 support such a claim. At best, it appears that Plaintiff, who studied both Christianity and
14 Islam, was removed from a voluntary, faith-based housing unit or a rehabilitation
15 program that was Christian-based, yet accepted all faiths. Thus, the Court will dismiss
16 without prejudice Plaintiff's free exercise claim.

17 **2. Free Speech/Retaliation**

18 Liberally construed, Plaintiff has stated a First Amendment retaliation claim
19 against Defendants Griego and Thomas. The Court will require Defendants Griego and
20 Thomas to answer the free speech/retaliation claim in Count One.

21 **3. Defendant Kimoto**

22 Plaintiff's reference to Defendant Kimoto in Count One does not state a First
23 Amendment claim against her. *See Shehee v. Luttrell*, 199 F.3d 295, 300 (6th Cir. 1999)
24 (defendants did not commit constitutional violations when they denied administrative
25 grievances, failed to intervene on plaintiff's behalf, and failed to remedy allegedly
26 unconstitutional behavior). Thus, the Court will dismiss without prejudice Plaintiff's
27 claim in Count One against Defendant Kimoto.

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1 **B. Count Two**

2 In analyzing a due process claim, the Court must first decide whether Plaintiff was
 3 entitled to any process, and if so, whether he was denied any constitutionally required
 4 procedural safeguard. Liberty interests that entitle an inmate to due process are
 5 “generally limited to freedom from restraint which, while not exceeding the sentence in
 6 such an unexpected manner as to give rise to protection by the Due Process Clause of its
 7 own force, nonetheless imposes atypical and significant hardship on the inmate in
 8 relation to the ordinary incidents of prison life.” *Sandin v. Conner*, 515 U.S. 472, 484
 9 (1995) (internal citations omitted).

10 To determine whether an inmate is entitled to the procedural protections afforded
 11 by the Due Process Clause, the Court must look to the particular restrictions imposed and
 12 ask whether they ““present the type of atypical, significant deprivation in which a state
 13 might conceivably create a liberty interest.”” *Mujahid v. Meyer*, 59 F.3d 931, 932 (9th
 14 Cir. 1995) (quoting *Sandin*, 515 U.S. at 486). “Atypicality” requires not merely an
 15 empirical comparison, but turns on the importance of the right taken away from the
 16 prisoner. *See Carlo v. City of Chino*, 105 F.3d 493, 499 (9th Cir. 1997). To determine
 17 whether the sanctions are atypical and a significant hardship, courts look to the prisoner’s
 18 conditions of confinement, the duration of the sanction, and whether the sanction will
 19 affect the duration of the prisoner’s sentence. *See Keenan v. Hall*, 83 F.3d 1083, 1088-89
 20 (9th Cir. 1996).

21 Plaintiff has not described the conditions of his confinement in punitive
 22 segregation or discussed whether being placed in punitive segregation affected the
 23 duration of his confinement. Simply being placed in punitive segregation for 60 days, in
 24 itself, is not an atypical and significant hardship and does not entitle Plaintiff to any due
 25 process procedural protections. *See Sandin*, 515 U.S. at 475-76, 487 (30 days’
 26 disciplinary segregation is not atypical and significant); *Smith v. Mensinger*, 293 F.3d
 27 641, 654 (3rd Cir. 2002) (seven months of disciplinary confinement “does not, on its
 28 own, violate a protected liberty interest”); *Jones v. Baker*, 155 F.3d 810 (6th Cir. 1998)

(two and one-half years' administrative segregation is not atypical and significant); *Rizzo v. Dawson*, 778 F.2d 527, 530 (9th Cir. 1985) (prison authorities may change a prisoner's "place of confinement even though the degree of confinement may be different and prison life may be more disagreeable in one institution than in another" without violating a prisoner's due process rights); *Lucero v. Russell*, 741 F.2d 1129 (9th Cir. 1984) (administrative transfer to maximum security without a hearing does not infringe on any protected liberty interest).

Even if Plaintiff had been subjected to an atypical and significant hardship, procedural due process safeguards in a prison disciplinary hearing require that the defendant receive: (1) written notice of the charges, no less than twenty-four hours prior to the hearing; (2) a written statement by the factfinders as to the evidence relied on and reasons for the disciplinary action and (3) a limited right to call witnesses and present documentary evidence when it would not be unduly hazardous to institutional safety or correctional goals to allow the defendant to do so. *Wolff v. McDonnell*, 418 U.S. 539, 565-66 (1974). Plaintiff does not claim that was denied any of these procedural safeguards.

In addition, "[t]here is no legitimate claim of entitlement to a grievance procedure," *Mann v. Adams*, 855 F.2d 639, 640 (9th Cir. 1988), and the failure to follow grievance procedures does not give rise to a due process claim. *See Flournoy v. Fairman*, 897 F. Supp. 350, 354 (N.D. Ill. 1995) (jail grievance procedures did not create a substantive right enforceable under § 1983); *Spencer v. Moore*, 638 F. Supp. 315, 316 (E.D. Mo. 1986) (violations of grievance system procedures do not deprive inmates of constitutional rights). "[N]o constitutional right was violated by the defendants' failure, if any, to process all of the grievances [plaintiff] submitted for consideration." *Buckley v. Barlow*, 997 F.2d 494, 495 (8th Cir. 1993). Moreover, "[t]he right to petition the government for redress of grievances . . . does not guarantee a favorable response, or indeed any response, from state officials. Moreover, the First Amendment's right to redress of grievances is satisfied by the availability of a judicial remedy." *Baltoski v.*

1 *Pretorius*, 291 F. Supp. 2d 807, 811 (N.D. Ind. 2003); *see also Ashann-Ra v. Virginia*,
 2 112 F. Supp. 2d 559, 569 (W.D. Va. 2000) (failure to comply with state's grievance
 3 procedure is not actionable under § 1983 and does not compromise an inmate's right of
 4 access to the courts).

5 Finally, Plaintiff's allegations based on Defendant Thomas's failure to grant
 6 Plaintiff's disciplinary appeal and Defendants Kimoto and Jinbo's "inaction," do not state
 7 a claim. *See Shehee*, 199 F.3d at 300.

8 Thus, the Court will dismiss without prejudice Count Two.

9 **C. Count Three**

10 The Court will dismiss Count Three because it is duplicative of his more clearly
 11 pled allegations in Count One.

12 **V. Motion for Summary Judgment**

13 Plaintiff has submitted a Motion for Summary Judgment and a Memorandum of
 14 Law, but has failed to file a statement of facts as required by Local Rule of Civil
 15 Procedure 56.1(a). Local Rule 56.1(a) provides:

16 Any party filing a motion for summary judgment must file a
 17 statement, separate from the motion and memorandum of law,
 18 setting forth each material fact on which the party relies in
 19 support of the motion. The separate statement should include
 20 only those facts that the Court needs to decide the motion.
 21 Other undisputed facts (such as those providing background
 22 about the action or the parties) may be included in the
 23 memorandum of law, but should not be included in the
 24 separate statement of facts. Each material fact in the separate
 25 statement must be set forth in a separately numbered
 paragraph and must refer to a specific admissible portion of
 the record where the fact finds support (for example,
 affidavit, deposition, discovery response, etc.). **A failure to
 submit a separate statement of facts in this form may
 constitute grounds for the denial of the motion.**

26 (Emphasis added.)

27 Because Plaintiff has failed to comply with Local Rule 56.1(a), the Court will
 28 deny without prejudice his Motion for Summary Judgment.

1 **VI. Warnings**

2 **A. Address Changes**

3 Plaintiff must file and serve a notice of a change of address in accordance with
4 Rule 83.3(d) of the Local Rules of Civil Procedure. Plaintiff must not include a motion
5 for other relief with a notice of change of address. Failure to comply may result in
6 dismissal of this action.

7 **B. Copies**

8 Plaintiff must serve Defendants, or counsel if an appearance has been entered, a
9 copy of every document that he files. Fed. R. Civ. P. 5(a). Each filing must include a
10 certificate stating that a copy of the filing was served. Fed. R. Civ. P. 5(d). Also,
11 Plaintiff must submit an additional copy of every filing for use by the Court. *See* LRCiv
12 5.4. Failure to comply may result in the filing being stricken without further notice to
13 Plaintiff.

14 **C. Possible Dismissal**

15 If Plaintiff fails to timely comply with every provision of this Order, including
16 these warnings, the Court may dismiss this action without further notice. *See Ferdik v.*
17 *Bonzelet*, 963 F.2d 1258, 1260-61 (9th Cir. 1992) (a district court may dismiss an action
18 for failure to comply with any order of the Court).

19 **IT IS ORDERED:**

20 (1) Counts Two and Three and the Free Exercise claim in Count One of the
21 First Amended Complaint are **dismissed** without prejudice.

22 (2) Defendants Kimoto and Jinbo are **dismissed** without prejudice.

23 (3) Defendants Griego and Thomas must answer the free speech/retaliation
24 claim in Count One of the First Amended Complaint.

25 (4) Plaintiff's Motion for Summary Judgment (Doc. 16) is **denied without**
26 **prejudice.**

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1 (5) The Clerk of Court must send Plaintiff a service packet including the First
2 Amended Complaint (Doc. 15), this Order, and both summons and request for waiver
3 forms for Defendants Griego and Thomas.

4 (6) Plaintiff must complete and return the service packet to the Clerk of Court
5 within 21 days of the date of filing of this Order. The United States Marshal will not
6 provide service of process if Plaintiff fails to comply with this Order.

7 (7) If Plaintiff does not either obtain a waiver of service of the summons or
8 complete service of the Summons and First Amended Complaint on a Defendant within
9 120 days of the filing of the Complaint or within 60 days of the filing of this Order,
10 whichever is later, the action may be dismissed as to each Defendant not served. Fed. R.
11 Civ. P. 4(m); LRCiv 16.2(b)(2)(B)(i).

12 (8) The United States Marshal must retain the Summons, a copy of the First
13 Amended Complaint, and a copy of this Order for future use.

14 (9) The United States Marshal must notify Defendants of the commencement
15 of this action and request waiver of service of the summons pursuant to Rule 4(d) of the
16 Federal Rules of Civil Procedure. The notice to Defendants must include a copy of this
17 Order. **The Marshal must immediately file signed waivers of service of the**
18 **summons. If a waiver of service of summons is returned as undeliverable or is not**
19 **returned by a Defendant within 30 days from the date the request for waiver was**
20 **sent by the Marshal, the Marshal must:**

21 (a) personally serve copies of the Summons, First Amended Complaint,
22 and this Order upon Defendant pursuant to Rule 4(e)(2) of the Federal Rules of
23 Civil Procedure; and

24 (b) within 10 days after personal service is effected, file the return of
25 service for Defendant, along with evidence of the attempt to secure a waiver of
26 service of the summons and of the costs subsequently incurred in effecting service
27 upon Defendant. The costs of service must be enumerated on the return of service
28 form (USM-285) and must include the costs incurred by the Marshal for

1 photocopying additional copies of the Summons, First Amended Complaint, or
2 this Order and for preparing new process receipt and return forms (USM-285), if
3 required. Costs of service will be taxed against the personally served Defendant
4 pursuant to Rule 4(d)(2) of the Federal Rules of Civil Procedure, unless otherwise
5 ordered by the Court.


6 (10) **A Defendant who agrees to waive service of the Summons and First**
7 **Amended Complaint must return the signed waiver forms to the United States**
8 **Marshal, not the Plaintiff.**

9 (11) Defendants Griego and Thomas must answer the free speech/retaliation
10 claim in Count One of the First Amended Complaint or otherwise respond by appropriate
11 motion within the time provided by the applicable provisions of Rule 12(a) of the Federal
12 Rules of Civil Procedure.

13 (12) Any answer or response must state the specific Defendant by name on
14 whose behalf it is filed. The Court may strike any answer, response, or other motion or
15 paper that does not identify the specific Defendant by name on whose behalf it is filed.

16 (13) This matter is referred to Magistrate Judge Bridget S. Bade pursuant to
17 Rules 72.1 and 72.2 of the Local Rules of Civil Procedure for all pretrial proceedings as
18 authorized under 28 U.S.C. § 636(b)(1).

19 DATED this 8th day of September, 2013.

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23 Robert C. Broomfield
24 Senior United States District Judge
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